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No. 1060

In the Supreme Court of the United States

OCTOBER TERM, 1966

OSCAR GRUSS & SON,

APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM
of
APPELLEES RICHARD JOYCE SMITH AND WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

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March 13, 1967

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OSCAR GRUSS & SON,
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v.

UNITED STATES OF AMERICA, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Richard Joyce Smith and William J. Kirk, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor, move, pursuant to paragraph 1(c) of Rule 16 of the Rules of this Court, that the judgment of the district court be affirmed on the ground that the questions raised are so unsubstantial as not to require further argument.

STATEMENT

This is an appeal from the summary judgment of a three-judge district court[1] dismissing appellant's com-

[1]The United States District Court for the Southern District of New York is referred to herein as the "district court". The plaintiffs in the action before the district court were Oscar Gruss & Son ("Gruss" or "appellant") and The New York, New Haven and Hartford Railroad Company Bondholders' Committee ("Committee"). In addition to the United States, the Interstate Commerce Commission ("Commission") was a defendant. Intervening defendants were Richard Joyce Smith and William J. Kirk, Trustees

plaint which sought to set aside orders of the Commission which approved the merger of Penn and Central upon condition that the New Haven be included.[2] Appellant sought to prevent consummation of the merger until the New Haven's inclusion is actually accomplished.[3] The district court unanimously found that Gruss lacked standing to bring the action (JS A-8) and that, even if such standing existed, the complaint was without merit. (JS A-14)

On March 9, 1962, Penn and Central filed a joint application with the Commission seeking authority to merge under §5(2) of the Interstate Commerce Act (49 U.S.C. §5(2)). The Trustees thereupon petitioned the Reorganization Court for authority to seek to intervene in the Penn-Central merger proceedings, and to seek inclusion of the New Haven in the proposed trans-

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of the property of The New York, New Haven and Hartford Railroad Company, Debtor ("Trustees"; the Debtor being referred to as "New Haven"), The Pennsylvania Railroad Company ("Penn") and The New York Central Railroad Company ("Central"). The survivor upon merger of Central into Penn is referred to as "Penn-Central".

The United States District Court for the District of Connecticut, in which the pending proceedings for the reorganization of the New Haven under Section 77 of the Bankruptcy Act (11 U.S.C. §205) were commenced on July 7, 1961, is referred to as the "Reorganization Court".

Appellant's Jurisdictional Statement and appendices thereto are referred to as "JS", followed by appropriate page references.

[2]Six appeals relating to other aspects of the same orders of the Commission, as well as the orders themselves, were argued before this Court on January 9 and 10, 1967, *Baltimore & Ohio Railroad Company, et al.* v. *United States, et al.* (October Term, 1966, Nos. 642, 680, 691, 813, 814 and 815).

[3]Appellant's action in the district court and a similar one brought by the Committee were consolidated. The Committee has not appealed.

action pursuant to §5(2)(d) (49 U.S.C. §5(2)(d)).[4] The petition was duly noticed and after a hearing, at which no one appeared in opposition, authority was granted on June 19, 1962. (R. 511)

The Commission's hearings on the proposed merger began in August, 1962.[5] The Trustees participated throughout the Commission proceedings, taking the position that the public interest required that approval of the merger be conditioned upon inclusion of the New Haven.[6] Until June 1, 1964, Penn and Central actively opposed inclusion of the New Haven under any circumstances and in any form. In a brief then filed with the hearing examiners, Penn and Central indicated that, if the Commission determined that the New Haven would be adversely affected, they might accept a condition requiring Penn-Central to operate the New Haven's freight lines for the account of the New Haven or to participate in other arrangements short of the New Haven's inclusion in Penn-Central. In their brief of

[4]On March 5, 1962, the Trustees had filed with the Reorganization Court an initial six months' report stating, *inter alia*, that:

". . . even with the passenger service problem solved, operations of the railroad streamlined and provision for deferred maintenance, service on the New Haven lines cannot be contemplated as a permanent continuing function unless it is merged with a Trunk Line railroad. This, in our opinion, must not merely be a physical interconnection, but a full and complete corporate merger. Only then can the disadvantages inherent in New Haven's terminal characteristics be overcome."

[5]Hearings were held on 128 days through October 2, 1963, and on September 16, 1964.

[6]The Trustees' position was based upon the contention that merger of Penn and Central would so substantially divert freight traffic that the New Haven would be unable either to survive as an independent railroad or to be reorganized. Appellant refers to the Trustees' evidence that the New Haven's loss of freight revenue would exceed $9.5 million annually (JS 9); it fails to note that such estimated loss represented *gross* freight revenue and that the Trustees estimated that the annual net loss would be approximately $5 million.

the same date, the Trustees contended that approval of the merger should require that the New Haven's operations be included in Penn-Central, and then asked that such inclusion be made a condition precedent to consummation of the merger.[7]

Shortly after the briefs were filed, the Trustees, Penn and Central commenced negotiations concerning possible terms for inclusion of the New Haven in Penn-Central. (R. 512) These resulted in a memorandum of understanding, the essential terms of which were agreed to on December 22, 1964, but which, following the resolution of additional details, was executed and delivered after February 5, 1965. In the negotiations, Penn and Central would not agree to delay consummation of their merger for the period required to complete proceedings under the Bankruptcy Act and Interstate Commerce Act necessary to accomplish the New Haven's inclusion. The understanding finally reached provided that, for the consideration and on the terms specified, Penn-Central, following merger, would purchase substantially all of the New Haven's assets as soon as all necessary administrative and judicial approvals had been obtained.[8]

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[7]Appellant incorrectly implies that the Trustees took this position from the time of their intervention in the Penn-Central proceedings. (JS 8-9) The Trustees' petition to the Reorganization Court for authority to seek intervention and inclusion and their petitions to the Commission in June, 1962 for intervention and inclusion do not speak of a condition precedent.

[8]Among other things, the memorandum of understanding, *which stated that it did not constitute a contract,* provided for:

(1) the conveyance to Penn-Central of substantially all of the New Haven's assets, other than current assets, free and clear of all system mortgage liens;

(2) a purchase price to be paid essentially in common stock and bonds of Penn-Central, plus cash and assumption of various liabilities;

The Trustees agreed with Penn and Central not to make the understanding public prior to issuance of a recommended report by the hearing examiners. The examiners' report was issued on March 29, 1965. Approval of the merger was recommended upon the condition, *inter alia,* that the New Haven's freight service be included, but the examiners did not recommend that such inclusion be a condition precedent to consummation of the merger.

Promptly after service of the examiners' report, the Trustees filed with the Reorganization Court a report on their negotiations with Penn and Central[9] and attached a copy of the memorandum of understanding. (R. 512) The report summarized the portions of the memorandum of understanding which stated that the memorandum "is not intended to constitute a contract" and that a "definitive agreement will be prepared as promptly as possible consistent with" the memorandum. The memorandum of understanding had been released to the public at that time.

As permitted by the Commission, exceptions to the examiners' report were filed in July, 1965. On July 9, 1965, appellant's counsel wrote to the Commission stating that the recommendation of the examiners relating to acquisition by Penn-Central of the New Haven's freight operations "is entirely fair and reasonable" and

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(3) a procedure for adjusting the purchase price to reflect transactions prior to inclusion, such as sales and purchases of property;

(4) certain conditions to Penn-Central's obligation, including the requirement that the Trustees take no position regarding the merger inconsistent with the memorandum of understanding; and

(5) the preparation of a definitive agreement consistent with the terms of the memorandum of understanding.

[9] Report of Trustees Concerning Proposed Sale of the Debtor's Assets to Pennsylvania New York Central Transportation Company, dated April 7, 1965.

that Gruss, having no objection thereto, has not sought intervention in the merger proceedings. (App. A-1) The Trustees replied to the exceptions, attaching a copy of the memorandum of understanding (R. 512), and urged the Commission to adopt the examiners' recommendations. Oral argument, at which the Trustees again fully supported the examiners' report, was heard by the full Commission in October, 1965.

As contemplated by the memorandum of understanding, the Trustees, Penn and Central executed an agreement on April 21, 1966, which set forth in detail the terms and conditions for the New Haven's inclusion in Penn-Central, subject to approval by the Commission and the Reorganization Court.[10] On the same day, the agreement was filed with the Reorganization Court and made public.

On April 27, 1966, the Commission issued its report and order, dated April 6, 1966, approving the merger subject, *inter alia,* to the New Haven's inclusion. (327 I.C.C. 475) Contrary to the examiners' recommendations, the Commission required that Penn-Central assume the New Haven's passenger service as well as

[10]The April 21 agreement provides that Penn-Central will (with certain minor exceptions) bear costs after December 31, 1963 relating to the operations of the New Haven incurred for (a) payments on equipment obligations; (b) payments for the acquisition of property or for additions and betterments to property; and (c) certain casualty losses. (R. 515)

Penn-Central is also required to reimburse the New Haven for deficits in freight service net railway operating income to the extent of $1,750,000 per year or partial year for the years 1965 through 1967. (R. 515)

In addition, the Trustees are not required to account to Penn-Central for shrinkage in the New Haven's assets by reason of depreciation, except in the case of property acquired since December 31, 1964. The book charge to operating income of the New Haven for depreciation exceeded $8.7 million in each of the years 1964 and 1965 and is expected to be of approximately the same magnitude in each year until closing. (R. 515)

its freight operations. The Commission provided that the merger could be consummated forthwith, directing that a plan for the New Haven's inclusion be filed by the Trustees, Penn and Central by October 27, 1966. Jurisdiction was reserved by the Commission to provide for inclusion "upon such fair and equitable terms and conditions" as it might impose, subject to Reorganization Court approval. (327 I.C.C. at 553) On October 4, 1966, the April 21, 1966 agreement was amended to conform to the Commission's report.[11] (R. 514)

On July 11, 1966, appellant, for the first time, petitioned the Commission for leave to intervene in the merger proceedings, and sought reconsideration of the April 6, 1966 report. Appellant asked the Commission to stay consummation of the merger pending further hearing, and requested a condition which would require inclusion of the New Haven as a condition precedent of the merger. (JS 12-13)

Various other persons also sought reconsideration and a delay in consummation of the merger. On July 29, 1966, the Trustees replied to these petitions for reconsideration.[12] The Trustees were particularly concerned by the requests for delay and stressed that the New Haven could not afford to run the risk that by reason of delay the merger might abort and thus lead to the New Haven's liquidation. The Trustees emphasized their intention to seek the earliest possible inclusion of the New Haven in accordance with their agreement with Penn and Central. With regard to appellant's position, the Trustees said that they had:

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[11]The amendment also made other changes designed to expedite inclusion.

[12]Contrary to appellant's implication (JS 12-13), the Trustees did not oppose appellant's petition to intervene in the merger proceedings.

". . . ceased to press [for the condition precedent] in favor of firm undertakings for New Haven's inclusion, coupled with appropriate provision for protection against delay. The Trustees are wholly convinced that the interests of the New Haven Estate are now best served by the quickest possible consummation of the merger, to be followed by prompt inclusion proceedings."

On September 16, 1966 the Commission denied appellant's petition for reconsideration, granting it the right to participate in the proceedings for the New Haven's inclusion which were expected to commence subsequent to October 27, 1966.[13] (328 I.C.C. 304)

Gruss filed its complaint in this case on October 18, 1966. A hearing was held by the district court on November 15, and its decision was rendered on November 28.[14]

DISCUSSION

Appellant's jurisdictional statement confines its discussion of alleged error by the district court to the determination that appellant did not have standing to institute proceedings for judicial review of the Commission's orders.[15] In the district court, the Trustees

[13]The district court noted that the Commission "plausibly argues that this did not make Gruss & Son a party to the proceeding leading to the order here sought to be reviewed but only in the subsequent 'inclusion' proceedings . . . ." (JS A-17, note 3)

[14]Judge Weinfeld, who joined in the district court's opinion, also filed a separate opinion dealing with his dissent in *Erie-Lackawanna R.R.* v. *United States,* 259 F. Supp. 964 (S.D. N.Y. 1966). The subsequent appeals in that case to this Court are referred to in note 2, *supra.*

[15]The district court's decision on the merits is one of the questions presented by appellant. (JS 7, ¶6) However, appellant has failed to include in its Jurisdictional Statement any reasons why the decision on the merits raises a question so substantial as to require plenary consideration for its resolution. See Rule 15, ¶1(f) of the Rules of this Court.

opposed appellant solely on the merits of its contentions. Other defendants took the position that appellant did not have standing. The district court was clearly correct in finding no merit in appellant's complaint and that appellant lacked standing.

1. For nearly three years prior to its petition for intervention in the merger proceedings, appellant was a party to the New Haven reorganization proceedings before the Commission.[16] In addition, appellant sought on June 7, 1965, to intervene in the Reorganization Court proceedings, alleging that it might be materially and adversely affected by a disposition of the New Haven's properties pursuant to the memorandum of understanding. (App. A-7 – A-8) The Reorganization Court denied intervention, but directed that appellant be added to the list of those entitled to notice of all matters assigned for hearing, emphasizing that even though appellant was not a party, it had a statutory right to be heard on all questions arising in the reorganization proceedings.[17] (App. A-9 – A-10)

At no time prior to the Commission's report and order of April 6, 1966, did appellant seek to participate in the merger proceeding or to have the Reorganization Court instruct the Trustees with regard to their position in that proceeding.

In its decision, the district court gave full consideration to appellant's contentions that the Trustees, by not insisting on the condition precedent, disabled themselves from effectively representing the bondholders.

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[16]On July 22, 1963, appellant was permitted to intervene in the Commission's proceeding in Finance Docket No. 21669, in which New Haven reorganization matters before the Commission are conducted.

[17]Section 77(c)(13) of the Bankruptcy Act (11 U.S.C. §205 (c)(13)).

(JS A-11 – A-13). Even if appellant's contentions were correct, and assuming the condition precedent issue had substance, appellant had sufficient knowledge of the existence of the memorandum of understanding to have acted in a timely fashion before the Commission issued its report and order of April 6, 1966.

Appellant's position that "[t]he earliest and the only feasible course of self-protection available to Gruss is the one he has taken" (JS 26) and that it could not have acted prior to filing its petition for reconsideration with the Commission in July, 1966 (JS 19), may be contrasted with the following: on June 7, 1965, in its petition to intervene in the Reorganization Court, appellant alleged as a ground that it might be materially and adversely affected by the memorandum of understanding (App. A-8); and on July 9, 1965, in its letter to the Commission with a copy to the Trustees (App. A-2 –A-3), appellant characterized as merely "one minor suggestion" its own request for a condition having the elements of a condition precedent, and stated that it had no objection to the examiners' recommendations, which did not provide for a condition precedent. (App. A-2)

In its letter of July 9, 1965, appellant also made clear to the Commission that its "one minor suggestion" was to require assumption by Penn-Central of responsibility for the New Haven's operations on the effective date of the merger, *only* "if prior thereto the parties have not come to an agreement as to terms" (App. A-2), and advised the Commission that the suggestion was "consistent with *the Examiner's proper concern that New Haven interests should not be placed in a position to delay indefinitely the Pennsylvania-New York Central merger.*" (emphasis added) (App. A-2)

The district court pointed out that "[a]lthough the Trustees of NH had initially sought inclusion as a con-

dition precedent, no such contention was before the Commission when it made its report of April 1966, and plaintiffs knew or ought to have known this." (JS A-13) Appellant's petition of June 7, 1965, for intervention in the Reorganization Court establishes that it had actual knowledge of the memorandum of understanding some ten months before the Commission issued its April 6, 1966 report and order. Appellant knew or ought to have known, by the Trustees' reply in August, 1965 to the exceptions taken to the examiners' report and by their oral argument before the Commission in October, 1965, that the Trustees were supporting the examiners' report.

In order for the district court to have found that an issue had been properly raised before the Commission and, consequently, was open to review, it had to read the Commission's report of September 16, 1966 as generously as possible to appellant. (JS A-14) On this basis the district court found that "the only issue which Gruss presented to the Commission was that inclusion be made a condition precedent to consummation." (JS A-14) Such issue must necessarily be based upon the adverse impact on the New Haven of a diversion of traffic to Penn-Central. However, as the district court pointed out:

> "The Commission is not under a mandate to protect against all diversion as a condition to the grant of immunity under the antitrust laws, as plaintiffs seem to think; it is concerned with diversion only as this bears on the 'public interest,' and that concept 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities,' *New York Central Sec. Corp.* v. *United States,* 287 U.S. 12, 25 (1932), with investor interest an element only insofar as its protection will serve to attain these goals." (JS A-7 – A-8)

Appellant has made no showing that the Commission could not adequately protect the interests of security holders in the proceedings which must be held under §5(2) of the Interstate Commerce Act and §77 of the Bankruptcy Act in order to determine the terms and conditions of the New Haven's inclusion. These proceedings are now in progress. A pre-hearing conference, at which appellant entered its appearance, was held by the Commission on December 19, 1966, and hearings commenced on January 16, 1967, with appellant an active participant.

The contentions made by appellant in the district court can be made in the inclusion proceedings and can be considered in an orderly fashion by the forum charged with the function of giving them consideration. The district court said:

> "We would agree with Judge Anderson's statement, in authorizing the Trustees to proceed before the Commission, that it is for that agency 'to determine in passing upon the plan for the inclusion whether these provisions [negotiated by the Trustees] adequately protect the estate for any possible losses in the time between consummation of the Penn-Central merger and inclusion of the New Haven, or whether additional terms are required.'" (JS A-8)

For the reasons stated above, the district court properly concluded that, in denying appellant's petition for reconsideration, "the Commission acted reasonably and within its powers." (JS A-14)

2. Appellant's argument on standing is based on *The Chicago Junction Case,* 264 U.S. 258, and the allegation that the district court misread *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U.S. 479 and *Alleghany Corp.* v. *Breswick & Co.,* 353 U.S. 151. (JS 19)

In *Breswick,* this Court found that the common stockholders did have standing, "by virtue of the threatened financial injury." (353 U.S. at 160) Appellant, however, cannot bring itself within the *Breswick* concept of such a threat. As the district court pointed out: "The PRR-NYC merger as proposed by the parties did not involve any transaction relating to NH. While it threatened injury to NH, it posed no 'individualized threat,' 353 U.S. at 173, to plaintiffs as distinguished from all other claimants against the NH estate." (JS A-10)

Appellant argues that an "individualized threat" is unnecessary for its standing because *Pittsburgh & West Virginia* made an exception in the instance of "orders entered in cases of reorganization . . .". (281 U.S. at 487) The Commission's order which appellant seeks to review is not, however, an order entered in a reorganization case. For the *Pittsburgh & West Virginia* exception to apply to appellant, the order must " 'deal with' their interests — their securities, rights, priorities and so on — as did the order in the *New York Central Securities* case and the order authorizing Alleghany to issue convertible preferred stock, or as the instant order did with respect to the stockholders of PRR and NYC." (JS A-11) It is the current proceeding for the New Haven's reorganization and determination of the terms of its inclusion, in which appellant is participating, which can lead to an order of the nature that appellant now claims the right to have reviewed.

Finally, appellant contends that its standing is, in any event, implied from its appearance before the Commission, relying on the *The Chicago Junction Case, supra.* As stated in *Seatrain Lines* v. *United States,* 152 F. Supp. 619, 622 (D.Del 1957), *aff'd,* 355 U.S. 181:

> "Early in the history of the law of standing there was an implication that intervention before the Commission conferred standing upon one to institute an action to challenge the order of the Commission [footnote citing *The Chicago Junction Case* omitted]. This implication has been completely and utterly destroyed by later pronouncements of the Supreme Court."

That this is the correct statement of the law is made clear by *Sprunt & Son* v. *United States*, 281 U.S. 249; *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 130 F. Supp. 76 (E.D. Mo. 1955), *aff'd*, 350 U.S. 892, *rehearing denied*, 350 U.S. 943; *Utah Citizens' Rate Association* v. *United States*, 192 F. Supp. 12 (D. Utah 1960), *aff'd*, 365 U.S. 649.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the questions presented by appellant are clearly unsubstantial and that the judgment of the district court should be affirmed.

Respectfully submitted,

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March 13, 1967

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July 9, 1965

Interstate Commerce Commission
Washington, D.C.

Re: *Finance Docket No. 21989–90*

Gentlemen:

Oscar Gruss & Son, holders of $10,556,000.00 Principal amount of New York, New Haven & Hartford Railroad Company, First and Refunding Mortgage 4% Bonds, have intervened in the proceeding before this Commission for the reorganization of that Railroad, Finance Docket No. 21669. As such holders of New York, New Haven & Hartford Railroad Company Bonds, Oscar Gruss & Son are vitally interested in the conditions relating to that Railroad to be included in any order of this Commission authorizing merger of the Pennsylvania and New York Central Railroads.

The recommendation in the Examiners' Proposed Report for the merged Pennsylvania – New York Central to acquire the New Haven's freight operations upon terms to be fixed by this Commission if the parties are unable to agree (F.D. 21989-90) is entirely fair and reasonable. Oscar Gruss & Son having no objection thereto, have not sought to intervene in this proceeding which has so many ramifications relating to the broad public interest.

However, Oscar Gruss & Son respectfully request that this letter be made a part of the Record in Finance Docket No. 21989-90 for the purpose of making one minor suggestion — namely, that the condition relating to acquisition of the New Haven's freight operations be expanded to require the merged Pennsylvania – New York Central to assume responsibility for those operations upon the effective date of the merger, if prior thereto the parties have not come to an agreement as to terms.

Such a provision would be consistent with the Examiner's proper concern that New Haven interests should not be placed in a position to delay indefinitely the Pennsylvania – New York Central merger.

At the same time it would prevent the Pennsylvania – New York Central resorting to delaying tactics which would permit New Haven's operating losses to consume all its valuable assets before the transfer of its freight operations can be consummated,

This, we believe, is fair to all parties concerned.

Respectfully submitted,

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IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

IN PROCEEDINGS FOR THE REORGANIZATION
OF A RAILROAD

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

No. 30226

PETITION OF OSCAR GRUSS AND SON AS HOLDERS OF FIRST AND REFUNDING MORTGAGE 4% BONDS, DATED JULY 1, 1947, OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FOR LEAVE TO INTERVENE.

TO THE HONORABLE ROBERT P. ANDERSON,
A JUDGE OF THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT SITTING
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF CONNECTICUT:

The petition of Oscar Gruss and Son (hereinafter called "Petitioners") as holders of First and Refunding Mortgage 4% Bonds (hereinafter called "4% Bonds") of the New York, New Haven and Hartford Railroad Company (hereinafter called the "Debtor"), respectfully shows:

1. Petitioners are members of the New York Stock Exchange and are holders in due course of $3,000,000, principal amount of 4% bonds.

2. Petitioners represent no holders of 4% Bonds other than themselves and have no present intention

of soliciting authorizations to represent or act for any other holders of 4% Bonds in this proceeding.

3. Petitioners may in the future be authorized or agree to represent and act for other holders of 4% Bonds, but in no event shall the number of holders whom Petitioners shall so represent and act for exceed twenty-five.

4. By order dated July 22, 1963, Petitioners were authorized by the Interstate Commerce Commission to intervene and become a party to the proceeding before that Commission in the New York, New Haven and Hartford Railroad Company Reorganization, Finance Docket No. 21669.

5. The 4% Bonds held by Petitioners represent a substantial interest in the property in the custody of, and subject to the control and disposition of, the Court in this proceeding.

6. Petitioners as holders of 4% Bonds may be materially and adversely affected by any plan of reorganization approved in this proceeding and pursuant to the provisions of Section 77 of the Federal Bankruptcy Act, as such holders, are entitled to oppose any plan proposed herein and to propose a plan of their own.

7. Petitioners may also be materially and adversely affected by disposition of the Debtor's properties or portions thereof pending proposals for and approval of a plan of reorganization. As an example of a possible material adverse effect upon their interest in the Debtor's property by disposition thereof, Petitioners refer to a certain Memorandum of Understanding, dated February 5, 1965, between the Debtor's Trustees,

the Pennsylvania Railroad Company and the New York Central Railroad Company, filed with this Court and made a part of the record herein on or shortly after March 31, 1965. Upon its face the Memorandum contemplates execution of a formal contract, subject to approval by this Court, whereby the merged Pennsylvania-New York Central, prior to any effort to reorganize the Debtor, would acquire substantially all of the Debtor's properties, except those portions thereof which the Pennsylvania-New York Central deem burdensome on the Debtor's operations, for a consideration which, in Petitioners' opinion, is wholly inadequate. Petitioners are entitled to be heard on the equity of any contract proposed herein pursuant to this Memorandum, as well as other proposed dispositions of the Debtors' properties or portions thereof, through presentation of evidence, argument and briefs, and if necessary to take any appropriate appeals.

8. The 4% Bondholders Committee has been permitted to intervene herein but Petitioners have not authorized that Committee to represent them or act upon their behalf, and Petitioners have no information as to the number of 4% Bonds represented by that Committee.

9. In order for Petitioners to adequately protect their interest in the development of a plan of reorganization for the Debtor and their interest in any disposition of the Debtor's properties or portions thereof, it is necessary for Petitioners to intervene generally in the proceeding so that they may receive notice of all applications and petitions to the Court.

WHEREFORE, Petitioners respectfully request:

That, pursuant to Sec. 77(c)(13) of the Federal Bankruptcy Act and Rule 24(a) (2) and (3) of the

Federal Rules of Civil Procedure, Petitioners be admitted and constituted as general parties to this proceeding with the right to receive notice of all applications and petitions, to receive copies of all papers filed herein, to make applications and petitions, to file motions, pleadings and other papers, and to be heard by testimony and argument; and that Petitioners have such other and further relief in the premises as to this Court may seem just.

Dated: June 7, 1965.

Oscar Gruss & Son

by JUDSON C. MCLESTER, JR.

Judson C. McLester, Jr.
Attorney for Petitioners

Judson C. McLester, Jr.
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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad,

In the Matter of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

No. 30226

MEMORANDUM OF DECISION ON PETITION TO INTERVENE

Oscar Gruss & Son, which is a partnership engaged in the brokerage of securities and which is a member of the New York Stock Exchange, has petitioned, on July 7, 1965, to intervene in this Chapter 77 proceeding on the representations that it is the holder in due course of $3,000,000 face value of New Haven Railroad First and Refunding Mortgage 4% Bonds and that it represents no other holder of this issue of bonds. Through discovery proceedings it was disclosed that on July 6, 1965 the petitioner, the partners of the petitioner and their affiliates, including spouses, held, of the issue mentioned, bonds of the face amount of $10,556,000, as well as $369,000 in the New Haven's 4½% bonds and $70,000 in the Harlem River Division 4¼%bonds. It also appeared that, as of July 6, 1965, one member of the firm was short 600 shares of New Haven preferred stock and 1,400 shares of New Haven common stock. The firm also held for customers' accounts $581,000 in face value of New Haven 4% bonds and $507,000 in face amount of New Haven 4½% bonds. Employees of the partnership also hold $81,000 in principal amount of the New Haven 4% bonds. The holdings of the petitioner, its partners and affiliates, have been acquired

since inception of the New Haven's reorganization proceedings on July 7, 1961.

Leave to intervene under §77(c)(13) is discretionary with the court. Discretion should be exercised in favor of intervention where it appears that the petitioner's interests are not being adequately protected or where such intervention would particularly aid or benefit the reorganization proceedings.

Neither ground has been either claimed or shown here. Petitioner's emphasis is mainly on the size of its interests. Size alone is, however, not a determining factor. Assuming the disclosed amounts of the holdings to be correct, recognition is given to a 10% or more holding by according the holder the right to file a reorganization plan, but this does not carry with it the right to intervene as a party. To decide otherwise and base intervention on size would create an impossible problem of where to draw the line and, once drawn, unless limited to very large holdings, would probably admit so many parties that the reorganization proceedings would become unmanageable. A single criterion of size would also operate to foreclose from intervention smaller holdings which were not being adequately protected.

The court is of the opinion that the petitioner's interests are adequately represented by the trustees under the mortgages and by the first mortgage bondholder's committee. The legitimate interests of the petitioner are, so far as anything shown in this case is concerned, the same as those of the trustees and the committee. The recognition of the petitioner's interests and the right to have them protected are in no wise lessened by the fact that, as a speculator in these bonds, the petitioner was unable to show how its intervention would

particularly aid or benefit the reorganization proceedings.

Section 77(c)(13) gives the petitioner the right to be heard on "all questions arising in the proceedings", and, to assist the petitioner in the exercise of that right, it may be added to the list of those entitled to notice of all matters assigned to be heard by the court in this case.

The petition to intervene is denied.

Dated at New Haven, Connecticut, this 25th day of August, A.D. 1965.

ROBERT ANDERSON
United States Circuit Judge
sitting by designation